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In The

Supreme Court of the United States

October Term, 1991

JOHN K. YEE and IRENE S. YEE, et al.,

Petitioners,

vs.

CITY OF ESCONDIDO,

Respondent.

On Writ Of Certiorari To The Fourth Appellate District, Division One, Court Of Appeal For The State Of California

BRIEF *AMICUS CURIAE* OF FLORIDA MANUFACTURED HOUSING ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

JACK M. SKELDING, JR.
(Counsel of Record)
DAVID D. EASTMAN
JENNIFER PARKER LAVIA
PARKER, SKELDING, LABASKY & CORRY
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730
Counsel for Florida Manufactured Housing Association, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE AMICUS CURIAE[1]

Florida Manufactured Housing Association, Inc. (hereinafter FMHA) is a Florida not-for-profit corporation organized and maintained for the benefit of approximately 1000 owners of Florida mobile home parks containing a combined total of approximately 300,000 to 350,000 mobile home lots. The owners of the 1000 mobile home parks comprise a substantial portion of the membership of FMHA. One of the primary purposes of FMHA is to act on behalf of its members before the various governmental agencies of the State of Florida to promote the interests of various segments of the manufactured housing industry.

Mobile home parks are heavily regulated in Florida by the "Florida Mobile Home Act." Fla. Stat. Ch. 723. There are rights granted to the purchaser of a mobile home located in a mobile home park. Currently, Florida law provides:

> The purchaser of a mobile home park within a mobile home park may become a tenant of the park if such purchaser would otherwise qualify with the requirements of entry into the park under the park rules and regulations, subject to the approval of the park owner, but such approval may not be unreasonably withheld.

Fla. Stat. § 723.059(1). The purchaser is entitled to assume the remainder of the term of any rental agreement

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[1] This Brief is submitted with the written consent of all parties filed with the Clerk of the Court.

between the seller and the mobile home park owner. Fla. Stat. § 723.059(3). However, the park owner may, within certain guidelines, increase the amount of the rent upon the expiration of the assumed rental agreement. Fla. Stat. § 723.059(4). Florida law also severely restricts the park owner's right to evict a tenant. Fla. Stat. § 723.061. The current situation which exists in California as a result of the interplay between California mobile home law and local rent control ordinances could not presently occur in Florida because the control of mobile home lot rents is expressly preempted to the state. Fla. Stat. § 723.004(1).

Nevertheless, FMHA has a vital interest in the outcome of this case because FMHA believes that if this Court determines that the Escondido ordinance in combination with California law does not effect a taking, that the State of Florida may enact similar legislation. The enactment of rent control legislation without provision for vacancy decontrol in Florida would have devastating consequences.

SUMMARY OF THE ARGUMENT

FMHA will not attempt to address all the arguments presented in this case. Instead, FMHA will focus on three important issues: 1) whether the City of Escondido ordinance in conjunction with California mobile home law effects an unconstitutional taking; 2) whether the combined legislation substantially advances a legitimate state interest; and 3) whether the challenged legislation provides just compensation.

FMHA will first demonstrate that the City of Escondido ordinance against the background of existing California law effects an unconstitutional taking. This is consistent with past decisions of this Court. This Court has not previously found rent control legislation to be a per se taking. Nor has this Court found that legislation which allows a tenant to choose his successor is unconstitutional. Nevertheless, the combination of the two is unquestionably unconstitutional, as will be shown below.

FMHA will next show that vacancy control does not substantially advance any legitimate state interest. Vacancy control does nothing to further the state interest in providing affordable housing to its citizens. In fact, vacancy control has exactly the opposite effect of artificially inflating the cost of existing mobile homes and creating a windfall for the current owners.

Finally, FMHA will show that the challenged legislation does not provide just compensation to the park owner. The provision in the ordinance for a reasonable rent compensates the park owner only for the temporary use of his land. The ordinance does not provide compensation to the park owner for the permanent deprivation of the use of his land. Therefore, the ordinance does not provide just compensation as required by the United States Constitution.

ARGUMENT

I. THE CITY OF ESCONDIDO ORDINANCE IN CONJUNCTION WITH CALIFORNIA MOBILE HOME LAW EFFECTS AN UNCONSTITUTIONAL TAKING.

The City of Escondido rent control ordinance coupled with existing California law, which substantially restricts a mobile home park owner's ability to choose his tenants, effects an unconstitutional taking. Thus, the challenged legislation violates the Fifth Amendment to the United States Constitution. The takings clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Co. v. Chicago,* 166 U.S. 226, 235-41 (1897).

This Court has not previously addressed the question of whether rent control legislation in combination with restrictions on the right of a mobile home park owner to control the identity of his tenants violates the takings clause. This Court has previously declined to find rent control legislation unconstitutional per se and declined a request to reconsider the constitutionality of rent control per se. *Pennell v. City of San Jose,* 485 U.S. 1, 12 n.6 (1988). This Court specifically declined to address the issue of whether the combination of rent control and restriction of a landlord's power to evict a tenant amounted to a physical taking of the landlord's property. *Id.* at 11 n.5.

This Court has never previously addressed the specific issue of rent control in mobile home parks. Therefore, this brief does not address the issue of the constitutionality of rent control, nor does it address the constitutionality of restrictions on the landlord's right to

determine who his tenants will be. However, the combination of rent control and vacancy control necessarily effects a physical taking of the mobile home park owner's property by giving the mobile home park tenant a permanent possessory interest in the park owner's land by virtue of the unfettered right of the mobile home owner to transfer his interest in the housing that is the subject of the rent control. The local ordinance is not necessarily constitutional just by virtue of the rent control component. As the Ninth Circuit has opined, a city may not "eviscerate a property owner's rights and shield its actions from constitutional scrutiny by calling it rent control." *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986).

Previous decisions of this Court finding rent control legislation to be constitutional are distinguishable from the instant case. In *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), this Court acknowledged that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Id.* at 440. As authority for such proposition, this Court cited numerous previous Supreme Court cases, including rent control cases. This Court recognized that "[i]n none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party." *Id.* This Court implicitly recognized that a different analysis is required where regulations require the landlord to suffer possession of his land by a third party. *Id.*

This Court has long differentiated between regulatory takings and takings in the form of physical occupation. *Id.* at 426. "When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Id.* at 427 (footnote omitted). "[P]ermanent occupations of land . . . are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Id.* at 430. By contrast to the small amount of space taken in *Loretto,* the legislation challenged herein allows permanent possession of entire lots within the mobile home park. "[A] permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* at 432 (footnote omitted). Property rights include the rights to possess, use and dispose of the property. *Id.* at 435. The legislation challenged herein allows the tenants to possess, use, and dispose of the park owner's property. The park owner retains almost nothing of the bundle of rights, other than the right to collect below-market rents. A permanent physical occupation of the property of another is "perhaps the most serious form of invasion of an owner's property interests . . . [because] the government does not simply take a single 'strand' from the 'bundle' of property rights; it chops through the bundle, taking a slice of every strand." *Id.*

The legislation challenged herein allows a third party to occupy the park owner's land forever. The park owner is essentially powerless to remove the stranger from his land. The position of the park owner as to the initial

tenant may be said to be analogous to that of the shopping center owner in *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). In *PruneYard,* the shopping center owner had opened his property to the public at large. *Id.* at 83. Similarly, with regard to the initial tenant, the park owner opens his property to the tenant. The park owner has made the initial decision to allow the tenant on his land.

However, with regard to the tenant's successors, the park owner is given no choice. He is required to suffer the occupation of his land by strangers of the tenant's choice. This Court has recognized that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Loretto,* 458 U.S. at 436. When the state allows a third party to occupy the landlord's land, a taking occurs the same as if the state itself were occupying the land. "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant." *Id.* at 432 n.9.

Thus, the park owner's situation under current California law more closely resembles that found in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). In *Kaiser Aetna* the landowner had opened his marina to lessees for a fee. *Id.* at 168. The marina was not generally open to the public. *Id.* The marina owner dredged a channel connecting the property to an adjacent bay to provide access to the Pacific Ocean for boat traffic. The Corps of Engineers asserted that the public had the right to use the facilities under a "navigational servitude." This Court held that a governmentally-required public easement in the marina was a taking. *Id.* at 180. Similarly here, the government is

requiring the park owner to allow the public access to the rent controlled property by allowing the tenant to decide who may purchase the mobile home and reside on the lot.

The decisions of lower courts finding that rent control legislation without vacancy decontrol effects a taking by allowing occupation of the property by the tenant are well-reasoned and this Court should adopt the positions taken therein. Two are decisions of the Ninth Circuit Court of Appeals. The other is a decision of the Third Circuit Court of Appeals. An examination of the reasoning of these three cases may help illuminate the issues before this Court.

In the first case, *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), the challenged ordinance was a rent control ordinance applicable to mobile home parks. In addition to the rent control provisions, the ordinance required the park owner to offer leases of unlimited duration. *Id.* at 1273. The court used a three-part test in adjudicating the park owners' claim: "(1) Did the governmental action amount to a taking of property? (2) Did it advance a legitimate governmental interest? (3) Was there just compensation?" *Id.* at 1274-75 (citations omitted). The court held that an unconstitutional taking occurred if the first question is answered in the affirmative and either of the remaining two questions is answered in the negative. *Id.* at 1275.

Hall focused on the possessory nature of the tenants' interest and recognized that this Court "reaches dramatically different results depending on whether it concludes that a particular governmental action amounts to a physical occupation of property or merely a regulation." 833

F.2d at 1275. The court then determined that the challenged ordinance transferred a possessory interest in property to the mobile home tenant. Under the ordinance, "the landlord's residual rights in the property are largely at the mercy of his tenants; he loses practically all right to decide who occupies the property, and on what terms." *Id.* at 1276. The court further stated, "If a tenant moves, the tenant alone decides who will be his successor by selecting the buyer for his rental unit; the landlord has no meaningful say as to who will live on the property, now or in the future." *Id.*

The court realized that the tenant was given "an economic interest in the land that he can use, sell, or give away at his pleasure." *Id.* Similar to the legislation before this Court, the legislation before the *Hall* court allowed removal of tenants for cause. Nevertheless, the court recognized that the tenants were "given an indefeasible right to possession so long as they pay the controlled rent and behave themselves." *Id.* at 1277. The court determine that as the ordinance was alleged to operate, "landlords are left with the right to collect reduce rents while tenants have practically all other rights in the property they occupy. . . . [T]his oversteps the boundaries of mere regulation and shades into permanent occupation of the property for which compensation is due." *Id.* at 1280.

Recently, the Ninth Circuit again addressed rent control in mobile home parks in *Azul Pacifico, Inc. v. City of Los Angeles*, 1991 WL 224528 (Nov. 1, 1991). The court followed the reasoning it had applied in *Hall*, 833 F.2d 1270, reaffirming the validity of the three-part test. However, *Azul Pacifico* reached the court in a different procedural posture. Unlike *Hall*, a trial on the merits had

been held. Thus, what had been found by the *Hall* court as theory was found as fact by the district court in *Azul Pacifico*.

The Third Circuit reached the same conclusion in *Pinewood Estates v. Barnegat Township Leveling Board*, 898 F.2d 347 (3d Cir. 1990). New Jersey law regulated the relationship between mobile home owners and park owners and prohibited park owners from requiring the removal of a mobile home from the park upon sale of the mobile home. The town of Barnegat enacted a rent control ordinance which did not provide for vacancy decontrol. The court determined that the challenged legislation permanently transferred a possessory interest in the rent-controlled park from the park owner to the tenant without compensation. The court found that the new tenants who paid a premium for the privilege of purchasing a mobile home in a rent-controlled park were in actuality paying advanced rent for the lot. However, the rent was paid not to the landlord, as it should be, but to the selling tenant.

The reasoning of the federal courts in *Hall*, *Azul Pacifico*, and *Pinewood Estates* is sound and comports with precedents of this Court. However, these cases do not go far enough. For example, all seem to rely heavily on the fact that the tenant is able to exact a premium for his mobile home as a result of the legislation. However, even if the tenant could not exact such a premium, the challenged legislation would be unconstitutional. The premium received by the tenant provides one method of determining the amount of compensation due. However, the tenant's ability to collect the premium is not a prerequisite to the finding of a taking.

As an extreme example, clearly if the legislation allowed the tenant to devise his leasehold interest in the land, that would effect a taking despite the fact that the tenant would receive no premium. The right to devise property is one of the most important property rights. "In one form or another, the right to pass on property . . . has been part of the Anglo-American legal system since feudal times." *Hodel v. Irving*, 481 U.S. 704, 716 (1987). To allow the tenant to devise his leasehold would enable the tenant and his devisees to occupy the park owner's land in perpetuity, thus creating a permanent physical invasion of the park owner's land which is necessarily a taking.

The Third Circuit appeared to recognize this distinction, for the court stated that the focus should not be on the additional compensation or "premium" which the tenant receives, but on the fact that the park owners are deprived of compensation for the loss of a possessory interest in their land. 898 F.2d 353. Curiously, however, the court went on to state that the local ordinance in conjunction with state law had "*created* valuable property interests for which" the park owners were not compensated. *Id*. The court's analysis is somewhat flawed because in actuality, no new interest is created. What occurs is simply a *transfer* of an existing monetary interest from the landlord to the tenant. The increase in value of the tenant's home corresponds to a decrease in the value of the landlord's property. The new tenant will pay the same amount in the long run. Under the unconstitutional scheme, he will pay the value of future reduced rents to the selling tenant in the purchase price of the mobile home.

The Third Circuit distinguished this Court's prior rent control cases on the basis of what the court saw as two significant differences between the challenged legislation and the typical urban rent control: "First, in urban apartment rent control it is the landlord who chooses, selects, and rents to the new tenants. No other party can sell the right to occupy the landlord's premises. Second, the tenant cannot occupy in perpetuity. Thus, the tenant does not acquire an inheritable right." *Id.* at 355.

Recent takings decisions of this Court do not undermine the foregoing analysis. This Court's decision in *Pennell v. San Jose*, 485 U.S. 1 (1988) fails to provide support for the position of Respondent herein. *Pennell* involved a challenge to a rent control ordinance which allowed a hearing officer to consider "hardship to a tenant" in deciding whether to permit a rent increase. This Court did not decide whether an unlawful taking occurred. The plaintiff's claim was found to be premature because the record failed to show that tenant hardship had ever actually been used as a factor to deny a rent increase. *Id.* at 9-10.

FCC v. Florida Power Corp., 480 U.S. 245 (1987), may, upon the most superficial level, be similar to the instant case. However, upon closer analysis, any similarities fade. In *FCC* this Court upheld a law which regulated the amount which could be charged by a utility company for the leasing of space on utility poles to cable television operators. *Id.* at 247. This Court found no taking. In distinguishing *Loretto*, this Court noted that the legislation before it did not give cable companies "any right to occupy space on utility poles," nor did the legislation "prohibit[ ] utility companies from refusing to enter into

attachment agreements with cable operators." *Id.* at 251 (footnote omitted). In *FCC* this Court again reiterated that economic regulations of the relationship between landlords and tenants are not per se takings so long as they do not require the landlord to surrender possession of his property to a third party. *Id.* at 252. The significant difference between the situation in *FCC* and that in *Loretto* was that in *FCC*, the landlord had invited the tenant onto his property. The government then had the right to regulate that relationship. In *Loretto*, by contrast, the landlord had not invited the third party onto her property.

The situation created by the interplay between the Escondido ordinance and California mobile home law is more analogous to the situation in *Loretto*. The park owner initially invites a tenant onto his land. At that point the rule in *FCC* applies and the government may regulate the rent. However, at the point where the government requires the landlord to accept a new tenant, one he did not invite, at the same reduced rent, the government has effected an unlawful taking of the landlord's property. In *FCC*, this Court specifically did not decide what the application of *Loretto* would be "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *FCC*, 480 U.S. at 251 n.6. Now this Court has the opportunity to address that question. FMHA respectfully suggests that this Court should decide that where the landlord is required to enter into, renew, or refrain from terminating rental agreements and the rent is controlled, an unlawful taking occurs.

To illustrate, suppose rent control legislation were enacted which provided that the park owner could raise

the rent to the market rate when the tenant sold the mobile home, but further provided that the difference between the controlled rent and the market rent would be paid to the selling tenant rather than to the park owner. Such legislation would unquestionably violate the takings clause. The legislation challenged herein does exactly the same thing, but requires the incoming tenant to pay the rent in a lump sum in advance in the form of a premium in purchasing the mobile home. The unlawful taking results from the fact that the park owner does not receive the full rent rather than the fact that the selling tenant does receive the rent.

II. THE CHALLENGED LEGISLATION DOES NOT SUBSTANTIALLY FURTHER A LEGITIMATE STATE INTEREST.

The next issue which must be addressed is whether the challenged legislation substantially furthers a legitimate state interest. This Court has "long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). Furthermore, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978).

Assuming that the legislation was enacted to alleviate a shortage of affordable housing, FMHA does not

challenge that as a legitimate state interest. However, the challenged legislation fails to substantially further that interest. In *Hall*, the Ninth Circuit declined to express a view on the issue of whether the legislation therein substantially advanced a legitimate state interest. However, the court noted:

> If appellants are able to prove their allegations, it would seem that the Santa Barbara ordinance will do little more than give a windfall to current mobile park tenants at the expense of current mobile park owners. If, as appellants allege, the ordinance has resulted in a substantial increase in the market price of mobile homes subject to the ordinance, this may well hinder rather than assist lower-income families seeking access to rental units in mobile park homes.

833 F.2d at 1282. The challenged legislation does not further a public purpose; instead, it provides a large benefit to a small group of existing mobile home tenants.

More recently, the Ninth Circuit suggested an alternative state interest which was furthered by the lack of vacancy decontrol as a part of rent control legislation. The court was concerned that existing tenants benefiting from rent control would suffer a significant injury when they decided to sell their homes. The fear of the court was that when rent-control tenants sold their homes, they would be forced to sell their homes at substantially reduced rates because with vacancy decontrol the landlord could set the rent for the new tenant so high that no one would want to buy the mobile home. This fear, however, defies logic. If the park owner has a tenant who is protected by rent control and the legislation provides for

vacancy decontrol, sale of the home is obviously in the landlord's best interest, because he is provided with an opportunity to increase the rent. Therefore, the park owner's interest will be in avoiding any increase which would prohibit the sale of the mobile home. The park owner will realize that if he negotiates too high a rent, the sale will not be consummated and he will continue to receive below market rents due to the rent control protection afforded the current tenant.

III. THE CHALLENGED LEGISLATION DOES NOT PROVIDE JUST COMPENSATION.

The final question which FMHA will address is whether the challenged legislation provides just compensation. As will be shown below, the legislation fails to provide adequate compensation. It is simplistic to argue that the allowance of "reasonable rents" provides just compensation. The rents, reasonable or otherwise, compensate the park owner, but only for the temporary occupation of his property by the tenant. The park owner is not provided any form of compensation for the permanent deprivation of the possession of his property. Assuming that the California laws restricting the park owner's right to exclude future tenants from his land are constitutional, such constitutionality must be based on the fact that, in the absence of rent control, the park owner is justly compensated for the use of his property. When the new tenant comes in, the park owner is given the opportunity to renegotiate the rent and to receive the market rate for his land. Thus, even if the perpetual right given to the tenant is a taking, it is not unlawful, because

the park owner is justly compensated. On the other hand, in the situation presently before this Court, where the rent control is not subject to vacancy decontrol, the park owner is not justly compensated. Therefore, the taking is unconstitutional.

Even if the legislation is allowable, and substantially furthers a legitimate state interest, the inquiry does not end there. "Whether compensation is adequate is an inquiry separate from whether there has been a taking." *Hall*, 833 F.2d at 1278. The Fifth Amendment "is designed not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987).

No matter how laudable the public purpose, if a taking occurs, the government must provide compensation. As this Court has reiterated, " 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' " *Id.* at 321-22 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

If the public purpose is so important, then the public should be forced to bear the burden of paying for it. "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). If a shortage of affordable housing

exists and the need is so great that tenants should be given the right to control their leasehold property in perpetuity, then the public should bear the cost of such government help in the form of housing subsidies or otherwise.

CONCLUSION

Based on the foregoing analysis, the decision of the lower court should be reversed.

Respectfully submitted,

JACK M. SKELDING, JR.
(Counsel of Record)
DAVID D. EASTMAN
JENNIFER PARKER LAVIA
PARKER SKELDING, LABASKY
& CORRY
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730
Counsel for Amicus Curiae
Florida Manufactured
Housing Association, Inc.